Supreme Court, U.S.
FILED

MAY 17 2001

OFFICE OF THE CLERK

(4)

No. 00-1606

IN THE

Supreme Court of the United States

MICHAEL CHANDLER, individually and as father and next friend of **JESSE CHANDLER**,

Petitioners,

vs.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

WILLIAM H. PRYOR JR.
ATTORNEY GENERAL OF ALABAMA
CHARLES B. CAMPBELL
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL OF ALABAMA
11 South Union Street
Montgomery AL 36130
(334) 242-7372

JAY ALAN SEKULOW
DEPUTY ATTORNEY GENERAL
(COUNSEL OF RECORD)
STUART J. ROTH
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

WALTER M. WEBER
5th Floor
1650 Diagonal Road
Alexandria, VA 22314
(703) 740-1450

Attorneys for Respondents

32 pp.

QUESTIONS PRESENTED

1. Whether this Court should deny review where petitioners' claims become moot on May 23, 2001, and where petitioners own tactical litigation choices produced the delay that rendered this case moot?

2. Whether this Court should deny review of the court of appeals' nonfinal judgment vacating and remanding an injunction for redrafting, where the district court will then be best situated to tailor any new injunction to reflect, inter alia:

   a. the concrete facts and circumstances of the case; and
   b. the intervening mootness of most or all of plaintiffs' challenges.

3. Whether the court of appeals correctly held that the district court erred by ordering public schools to impose discriminatory censorship against genuinely student-initiated religious speech?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

I. THIS COURT SHOULD DECLINE TO REVIEW THIS CASE FOR WANT OF AN ARTICLE III CASE OR CONTROVERSY 8

II. THE QUESTIONS FOR WHICH PETITIONERS SEEK REVIEW ARE NOT PRESENTED IN THIS CASE 9

III. THE DISTRICT COURT SHOULD BE PERMITTED THE OPPORTUNITY TO REDRAFT THE INJUNCTION IN THE FIRST INSTANCE 10

IV. THE DECISION OF THE ELEVENTH CIRCUIT FAITHFULLY APPLIES THIS COURT'S PRECEDENTS 15

V. THERE IS NO CONFLICT IN THE CIRCUITS WARRANTING REVIEW 19

A. The Limited and Arguable Conflict with *Cole v. Oroville Union* Does Not Warrant Review 19

B. The Decision Below Does Not Conflict with Any Other Circuits 20

VI. PETITIONERS ARE NOT ENTITLED TO VACATUR OF THE DECISION BELOW 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

ACLU v. Blackhorse Pike Regional Board of Education,
84 F.3d 1471 (3d Cir. 1996) (en banc) 21

Altman v. Bedford Central School Dist.,
245 F.3d 49 (2d Cir. 2001) 12

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 8, 23

Berger v. Renssalaer Central School Corp.,
982 F.2d 160 (7th Cir.), *cert. denied*,
508 U.S. 911 (1993) 21

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 16

Bush v. Gore, 531 U.S. 9 (2000) 23

Chandler v. DeKalb County School Board,
No. CV 96-PT-1000-M (N.D. Ala.) 1

Chandler v. James, 958 F. Supp. 1550
(M.D. Ala. 1997) 2

Chandler v. James, 180 F.3d 1254
(11th Cir. 1999) ..... 5, *passim*

Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000) ..... 6, *passim*

Chandler v. Siegelman, 530 U.S. 1256 (2000) 6

Cole v. Oroville Union High School, 228 F.3d 1092 (9th Cir. 2000), *cert. denied sub nom. Niemeyer v. Oroville Union High School*, 121 S. Ct. 1228 (2001) 19, 20

Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981) 21

Crampton v. Zabriskie, 101 U.S. 601 (1880) 11

Doe v. Madison School Dist. No. 321, 177 F.3d 789 (9th Cir. 1999) (en banc) 13

Doremus v. Board of Educ., 342 U.S. 429 (1952) 11

Everson v. Board of Educ., 330 U.S. 1 (1947) 16

Flast v. Cohen, 392 U.S. 83 (1968) 11

Joint School District No. 241 v. Harris, 515 U.S. 1154 (1995) 12

Lewis v. Casey, 518 U.S. 343 (1996) 13

Lynch v. Donnelly, 465 U.S. 668 (1984) 16

Niemeyer v. Oroville Union High School,
121 S. Ct. 1228 (2001) 19

Santa Fe Independent School District v. Doe,
530 U.S. 290 (2000) 6, 16, 18, 19, 20

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 13

Stein v. Oshinsky, 348 F.2d 999 (2d Cir.),
cert. denied, 382 U.S. 957 (1965) 21, 22

U.S. Bancorp Mortgage Corp. v. Bonner
Mall Partnership, 513 U.S. 18 (1994) 22, 23

Zobrest v. Catalina Foothills School Dist.,
509 U.S. 1 (1993) 16

Constitutional and Statutory Provisions

Ala. Code § 16-1-20.3 ..... 1, 2

42 U.S.C. § 1983 1

U.S. Const. art. III 8, 9, 13

U.S. Const. amend. I ..... 1, *passim*

U.S. Const. amend. XIV 1

Other Authorities

R. Stern, E. Gressman, S. Shapiro & K. Geller,
Supreme Court Practice (7th ed. 1993) 22

STATEMENT OF THE CASE

Petitioner Michael Chandler brought suit on his own behalf and on behalf of his son Jesse, a minor. Chandler and his son challenged the constitutionality of both an Alabama statute, Ala. Code § 16-1-20.3, and alleged religious practices in the DeKalb County schools, under the First and Fourteenth Amendments to the United States Constitution. Chandler brought suit under 42 U.S.C. § 1983, naming as defendants in their official capacities the Governor of Alabama, the Attorney General of Alabama, the Alabama State Superintendent of Education, the members of the Alabama State Board of Education, the DeKalb County Superintendent of Education, and the members of the DeKalb County Board of Education. Chandler requested a declaration of the unconstitutionality of the Alabama statute and the challenged religious practices in the schools, an injunction prohibiting the challenged religious practices in the schools, and an award of attorney fees. Complaint ["Cplt."] at 18-19. Chandler did *not* seek damages. *Id. See also* Plaintiffs' Report on Status of Protective Order for Pseudonymous Pleading, Joint Motion to Vacate Trial Setting and Agreement Regarding Voluntary Cessation, and Joint Stipulations of Fact, p. 2 ("As the plaintiffs have stressed to various counsel, this suit is for injunctive relief, not damages").

At the time Chandler filed suit, he was an assistant principal at Valley Head School, a school operated by respondent DeKalb County Board of Education. Cplt. at 3. Michael Chandler has since retired from that position.[1]

---

[1]Chandler retired pursuant to a settlement agreement in a separate, employment-related lawsuit. *Chandler v. DeKalb County School Board*, (continued...)

Chandler's son Jesse was a seventh grade student at Fyffe School, a school operated by respondent DeKalb County Board of Education, at the time suit was filed on February 1, 1996. Cplt. at 3. It is undisputed that Jesse Chandler is now a high school senior and is expected to graduate on May 23, 2001. *See* Pet. at 3.

On March 12, 1997, the district court granted partial summary judgment for Chandler, holding unconstitutional the challenged state statute, § 16-1-20.3. *Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. 1997).[2] No party pursued an appeal from that decision.

On October 29, 1997, the district court issued a Permanent Injunction. Pet. App. F1-F21. This injunction imposed a complex set of restrictions, exceptions to the restrictions, and exceptions to the exceptions. Pet. App. F4-F14. For example, in paragraph 6(a), the injunction purported to restrict only "school organized or officially sanctioned religious activity in the classrooms," but nevertheless applied "regardless of whether the activity is initiated, led by, or engaged in by students." Pet. App. F4 (emphasis omitted). The same

---

[1](...continued)
No. CV 96-PT-1000-M (N.D. Ala.). As part of that settlement, Chandler also agreed not to seek future employment of any nature with the DeKalb County School System.

[2]The petitioners' Appendix to the Petition purports to, but does not, contain this opinion as Appendix E. Instead, pages E3-E75 simply duplicate pages G3-G75. The Court should also note that the footnote numbering in petitioners' Appendix D is pervasively jumbled. (Respondents promptly alerted petitioners to these and other formatting problems.)

provision explicitly permitted students "to quietly engage in religious activity during non-instructional times," but only "so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves." *Id.* F5 (emphasis omitted).

Certain provisions of the injunction allowed DeKalb County school officials to treat student religious expression evenhandedly with other student expression, *e.g.*, *id.* F6, F13 (student religious literature distribution subject to same time, place, and manner restrictions as student distribution of nonreligious materials). Elsewhere, however, the injunction commanded DeKalb to impose discriminatory restrictions only on private religious expression. *Id.* F4-F14. For example, students could recite secular texts or sing secular songs at school-sponsored talent shows but could not use material with a religious content or viewpoint. Pet. App. F9-F10 (para. 6(d)). Student graduation speakers could expound at length on secular subjects or the gratitude due parents but could not give more than a "brief personal expression . . . which contains religious references," Pet. App. F6-F8 (para. 6(b)).

In view of its earlier opinion overturning the challenged state statute and its permanent injunction addressing the challenged religious practices, the district court then vacated a trial setting for the case as unnecessary.

On November 12, 1997, the district court issued findings of fact and conclusions of law in a Supplemental Opinion and Order. Pet. App. G1-G75. The same day, the district court granted partial summary judgment for Chandler and made

accompanying findings of fact and conclusions of law in a Memorandum Opinion and Order. Pet. App. H1-H30.

Respondents appealed from the Permanent Injunction, the Supplemental Opinion and Order, and the Memorandum Opinion and Order.

On appeal, respondents[3] contested only certain aspects of the *remedy* the district court selected. Respondents did not appeal the district court's invalidation of the challenged state statute. Nor did respondents contest on appeal the district court's findings that the DeKalb County defendants had previously engaged in unconstitutional officially organized or sponsored religious activities. Rather, the respondents challenged on appeal only specific portions of the Permanent Injunction. *See* Pet. App. B4-B6.

In particular, respondents focused their appeal upon those portions of the Permanent Injunction that forbade DeKalb County from "permitting" various religious expressive activities by students and other nonschool personnel. Respondents did not contend that students have an affirmative right to engage in religious speech even where secular student speech would not be permitted. Instead, respondents argued that the injunction improperly required DeKalb to impose unconstitutionally *discriminatory* restrictions on private religious expression. Respondents also contended that the injunction's mix of broad

---

[3]In this and the three following text paragraphs, the term "respondents" refers to all of the respondents except the Governor of Alabama. Then-Governor Fob James filed a separate appeal, which the Eleventh Circuit rejected, Pet. App. B4. The current Governor, Don Siegelman, joins the other respondents in this Brief in Opposition.

restrictive language and ambiguously defined "safe harbor" exceptions (and exceptions to the exceptions) rendered the injunction impermissibly vague. Finally, respondents argued that considerations of mootness and lack of standing doomed some (but, at that time, not all) of plaintiffs' requests for prospective injunctive relief.

A panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously vacated the Permanent Injunction. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (*Chandler I*). *See* Pet. App. B1-B26. The panel held that "genuinely student-initiated religious speech . . . is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." Pet. App. B15. The panel condemned the "discriminatory suppression of student-initiated religious speech," *id.* B14; *accord id.* B13, B23-B24, while noting that a "school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech," *id.* B25. Because the Permanent Injunction forbade DeKalb from "permitting" students to "speak religiously," the panel concluded the injunction unconstitutionally required DeKalb to engage in discriminatory suppression of student religious speech. *Id.* B25. Accordingly, the panel vacated the Permanent Injunction and remanded for further proceedings. *Id.* B26. "We do not undertake to re-write the Permanent Injunction," the panel explained. "The district court is in the best position to do that." *Id.* B25.

Given its disposition of the appeal, the panel had no occasion to address respondents' vagueness arguments or to examine, in the first instance, to what extent considerations of mootness and standing might limit the relief Chandler could obtain.

The Eleventh Circuit denied rehearing and rehearing en banc. *See* Pet. App. A2.

Chandler filed a petition for certiorari. After this Court subsequently announced its decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), this Court summarily granted the petition in *Chandler I*, vacated the judgment of the Eleventh Circuit, and remanded the case for further consideration in light of *Santa Fe*. *See Chandler v. Siegelman*, 530 U.S. 1256 (2000) (Pet. App. C1).

On remand, after receiving supplemental briefs from the parties, the Eleventh Circuit panel reinstated its prior judgment. *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) (*Chandler II*). *See* Pet. App. A1-A9. The panel explained:

> *Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent.

Pet. App. A3 (footnote omitted; emphasis in original). The panel noted that

> *Santa Fe* does not obliterate the distinction between State speech and private speech in the school context. It does not reject the possibility that some religious speech may be truly private even though it occurs in the schoolhouse.

Pet. App. A6. Thus, "[w]hat the Court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a

school-sponsored prayer." Pet. App. A7. The panel reaffirmed that "[s]o long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected[.]" Pet. App. A8 (emphasis in original). Whereas the district court injunction "assumed that virtually any religious speech in schools is attributable to the State," *id.* A6, that injunction was unconstitutionally overbroad: "it eliminated any possibility of *private* student religious speech under any circumstances other than silently or behind closed doors." *Id.* A7 (emphasis in original). The panel accordingly reinstated its judgment vacating the district court injunction and remanding for reformulation of the injunction:

> [In *Chandler I*, we] directed the district court to revisit its injunction in order to ensure that it did not command the school district to actively prohibit -- censor -- genuinely student-initiated religious speech, and we do so again.

Pet. App. A8.

The Eleventh Circuit issued its panel decision in *Chandler II* on October 19, 2000. Rather than promptly seeking review in this Court, in light of Jesse Chandler's approaching graduation from high school (and thus from the DeKalb County School System) in May of 2001, Chandler once more petitioned for rehearing en banc. The Eleventh Circuit denied en banc rehearing on April 13, 2001. Pet. App. I1-I2.

Chandler then filed another petition for certiorari.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DECLINE TO REVIEW THIS CASE FOR WANT OF AN ARTICLE III CASE OR CONTROVERSY.

This Court should either dismiss or deny the petition for certiorari, *see infra* § VI, in light of the mootness of petitioners' claims.

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citations omitted). This case becomes moot on May 23, 2001, when petitioner Jesse Chandler graduates from the DeKalb County School system. *See supra* at 2. All that the petitioners seek is *prospective* relief against school activities. *Supra* at 1. Those prospective claims plainly lose all vitality once Jesse leaves the school system. *Accord Arizonans*, 520 U.S. at 67. Indeed, petitioners anticipate as much. Pet. at 3 n.1; *id.* at 22.

Furthermore, petitioners will lack standing for the entirety of their claim as of May 23, 2001. Once Jesse graduates, his claim of standing as a student evaporates, as does his father Michael Chandler's derivative right to sue as Jesse's "next friend."

Accordingly, this Court should dismiss the petition for certiorari. In the alternative, this Court should simply deny the

writ because the imminent absence of Article III jurisdiction makes this case unattractive for review.

II. THE QUESTIONS FOR WHICH PETITIONERS SEEK REVIEW ARE NOT PRESENTED IN THIS CASE.

This Court should deny review because the "Questions Presented," for which petitioners seek review, are simply not presented by this case.

In Question One, petitioners attack the Eleventh Circuit for "permitting prayers by students and nonschool persons over the public address system at football games, compulsory school assemblies, and graduation ceremonies and over the classroom intercom," Pet. at i. But the Eleventh Circuit did *not* order such prayers to be permitted; rather, it held that it was unconstitutional *discriminatorily* to prohibit genuinely student-initiated religious speech. Pet. App. A9; *id.* B14-B26. A public school need not "permit" *any* speech by students and nonschool persons at all. But once a public school *does* permit genuinely private speech, it may not discriminatorily censor out speech that is religious. That is the unexceptionable principle that the Eleventh Circuit embraced. *Infra* § IV.

In Question Two, petitioners attack the constitutionality of "group prayer before a captive audience of K-12 students," Pet. at i. This question is not presented. Neither the Permanent Injunction under review, nor the Eleventh Circuit opinions vacating that injunction, purport to address the distinct issues of either "group prayer" or "captive audiences." Rather, the Permanent Injunction restricted religious speech by *any* student, whether engaged in as an individual or together with others.

The injunction was also not limited to "captive" situations. The Eleventh Circuit, overturning the district court, merely directed implementation of the neutrality principle for genuinely student-initiated speech. Petitioners' phrasing of Question Two, then, is a tendentious characterization of a narrow hypothetical, and not a fair description of any question properly presented. Furthermore, Michael Chandler and his *twelfth-grade* son lack standing to seek prospective relief regarding *grades K-11*; in addition, therefore, petitioners cannot press Question Two, as phrased, for jurisdictional reasons.

In sum, neither of the two questions petitioners pose are properly presented here.

III. THE DISTRICT COURT SHOULD BE PERMITTED THE OPPORTUNITY TO REDRAFT THE INJUNCTION IN THE FIRST INSTANCE.

The decision of the Eleventh Circuit in this case is nonfinal. The court of appeals in *Chandler I* vacated the Permanent Injunction but did not "undertake to re-write" that injunction. Pet. App. B25. The court of appeals recognized that "[t]he district court is in the best position to do that [i.e., rewrite the injunction]." *Id.* Accordingly, the court of appeals remanded for further proceedings. *Id.* B26. In *Chandler II*, after remand from this Court, the court of appeals reinstated its prior judgment, once more vacating the injunction and remanding for redrafting. App. A9.

This Court should deny certiorari to allow the district court the opportunity to redraft any injunction that might still be

warranted. This approach makes eminent sense for several reasons.

First, the injunction has to be narrowed in significant respects in any event, which will eliminate much of the scope of the controversy. It would be premature, and an exercise of advisory opinion-making, for this Court to review constitutional issues that likely will be removed from the case on remand.

- Michael Chandler, the lead petitioner, has retired from his position as assistant principal at a DeKalb County high school. Hence, his only basis for seeking prospective relief is as a parent.[4] Michael Chandler's son Jesse, meanwhile, is now a twelfth grader. Any claims for prospective relief -- which is all petitioners seek -- based upon alleged unconstitutional practices in lower grades are now moot.[5]

---

[4]Michael Chandler also alleged that he was a taxpayer, Cplt. at 3, but he did not allege or prove that the practices challenged as unconstitutional necessitated any expenditures of tax funds. Consequently, Chandler lacks taxpayer standing. *See Crampton v. Zabriskie*, 101 U.S. 601, 609 (1880) (taxpayer standing requires challenge to a genuine "disposition of the [government] moneys"); *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (for taxpayer standing, it "will not be sufficient to allege an incidental expenditure of tax funds in the administration of [government]"); *Doremus v. Board of Educ.*, 342 U.S. 429, 431-35 (1952) (incidental expenditures insufficient for taxpayer standing).

[5]For example, there is no suggestion that Jesse will ever again encounter Ms. Carroll, his fifth and sixth grade teacher who allegedly solicited student prayer. Cplt. ¶ 16; M. Chandler Aff. ¶ 17. Likewise, Jesse will never more encounter the Gideon's distribution of Bibles to the fifth grade classes. Cplt. ¶ 42; M. Chandler Aff. ¶¶ 21-25. The Gideons have only distributed to the fifth and twelfth grade classes. Cplt. ¶ 44; M. Chandler Aff. ¶ 24. Only the conclusion of the twelfth grade lies ahead for Jesse, and a new

(continued...)

See, e.g., Joint School District No. 241 v. Harris, 515 U.S. 1154 (1995) (vacating and remanding for dismissal, as moot, Establishment Clause challenge to graduation prayer, apparently because student plaintiffs graduated during pendency of case).[6]

---

[5](...continued)
DeKalb policy precludes Gideon distribution of Bibles in twelfth grade (and other grade) classrooms. *See* "Distribution of Literature -- Student Rights and Protection" (R. Supp. 1-240, Ex. A) (forbidding "the distribution by . . . nonschool individuals of commercial, political, religious, or promotional materials to students on public school property"); Order (R. Supp. 1-260-1 to 2) (approving policy). Monthly 4-H meetings are held for elementary and junior high school students. Cplt. ¶ 30; M. Chandler Aff. ¶ 26. Concerns regarding these meetings, Cplt. ¶ 29; M. Chandler Aff. ¶ 27-28, became moot when Jesse finished ninth grade in the spring of 1998. Jesse's objection to the D.A.R.E. program for fifth graders, Cplt. ¶¶ 25-27; M. Chandler Aff. ¶¶ 29-32, likewise presents no injury likely to recur. There is no indication that the December 1994 PTO incident -- the coincidence of Jesse's school concert band playing at a meeting which was opened by a prayer, Cplt. ¶ 28; M. Chandler Aff. ¶¶ 34-36 -- is ever likely to recur. The same goes for the two incidents in 1995 in which Jesse received flyers about religious programs or events. Cplt. ¶¶ 45-46; M. Chandler Aff. ¶¶ 37-39. Moreover, the last football season of Jesse's public school career ended months ago, rendering moot his objection to prayers at football games he attends, Cplt. ¶ 19; M. Chandler Aff. ¶ 15.

In sum, the only matters, concerning Jesse, for which there would be any conceivable likelihood of recurrence, appear to be graduation prayers at Fyffe School (the school Jesse was attending, Cplt. ¶ 2), Cplt. ¶ 22; M. Chandler Aff. ¶ 4, and special meeting times or assemblies of Bible clubs at Fyffe School, Cplt. ¶ 49; M. Chandler Aff. ¶¶ 42-44. As to all other matters, mootness precludes relief. Moreover, there is no apparent reason why Jesse would have standing to challenge the Bible club meeting times.

[6]Lower courts likewise dismiss, as moot, Establishment Clause challenges seeking prospective relief from activities in schools which the challengers no longer attend. *E.g., Altman v. Bedford Central School Dist.*,
(continued...)

- The Permanent Injunction improperly granted relief at *all* DeKalb schools, regardless of where Jesse was in attendance. The excessive scope of this relief must be addressed on remand. Lack of Article III standing bars Jesse from seeking relief for activities that do not affect him. "[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). Thus, Jesse cannot pursue relief at schools he does not attend. *See Lewis v. Casey*, 518 U.S. 343, 357-60 & n.7 (1996) (remedy must be limited to injury shown). Relief for Jesse for schoolday activities must be limited to Fyffe School; relief as to meetings or football games must be limited to those events that involve the Fyffe School Concert Band (of which Jesse was a member) or a Fyffe football team (whose games Jesse attended), or other events at which Jesse is likely to be in attendance. *Accord Lewis*, 508 U.S. at 349 ("It is the role of courts to provide relief to claimants . . . who have suffered, or imminently will suffer, actual harm; it is not the role of courts . . . to shape the institutions of government in such fashion as to comply with the laws and the Constitution").

- The Permanent Injunction is vague in many respects and requires redrafting for clarity. Many examples could be cited. *E.g.*, Pet. App. F5 (allowing students to engage in religious activity only if they do so "quietly" and if the

---

[6](...continued)
245 F.3d 49 (2d Cir. 2001); *Doe v. Madison School Dist. No. 321*, 177 F.3d 789 (9th Cir. 1999) (en banc).

activity "does not unduly call attention thereto"); *id.* F7 (allowing student speakers to include in a graduation address only a "brief personal expression . . . which contains religious references"). (The district court expended considerable ink attempting to explain that its injunction did not mean what its terms apparently stated, Pet. App. D32-D104, and begrudgingly conceded that, at least in part, the injunction "may not be sufficiently narrowly tailored," *id.* D48 n.26 [sic: was n.24 in original, *see supra* note 2].)

Second, the district court is best situated to make the initial determination of how to redraft the injunction. Standing, mootness, and vagueness considerations all have factual dimensions as well as legal dimensions. The district court -- unlike a reviewing court -- can take additional evidence on these issues. The district court can then decide what, if any, prospective relief would represent a properly tailored response to the specific factual circumstances and remaining legal controversies. At that point, any party considering itself aggrieved could seek further review.

Third, Supreme Court review at the present stage would require this Court to address issues not yet addressed or decided below. The Eleventh Circuit did not reach any of the standing, mootness, or vagueness arguments -- by vacating the injunction in its entirety and remanding, the court of appeals did not need to reach these issues. But to uphold the Permanent Injunction -- the relief petitioners seek -- this Court would have to confront and resolve these additional objections to the Permanent Injunction. In particular, this Court would first need to address the threshold jurisdictional questions of standing and mootness.

Given that resolution of these matters should sharply limit the scope of the legal controversy, it makes little sense to grant review at the present stage of proceedings.

In sum, the injunction at issue has been remanded for redrafting. On remand, the district court will need to address the impact of mootness, standing, and vagueness concerns as well as the Eleventh Circuit's opinions below. Should any controversy between the parties remain after remand, any aggrieved party can then seek appellate review. Supreme Court review at this point would be premature.

IV. THE DECISION OF THE ELEVENTH CIRCUIT FAITHFULLY APPLIES THIS COURT'S PRECEDENTS.

The opinions of the Eleventh Circuit in this case faithfully apply this Court's precedents under the First Amendment's speech and religion clauses. Petitioners' attempt to characterize the decision below in a contrary fashion represents a serious distortion and misreading of that court's rulings.

The precise question before the Eleventh Circuit was whether the district court erred by ordering the DeKalb County schools to impose discriminatory restrictions on private religious speech (primarily student speech). Pet. App. A8; *id.* B13. The Eleventh Circuit properly rejected the district court's approach and held that school officials must treat genuinely student-initiated religious speech evenhandedly with student-initiated non-religious speech. *Id.* A9; *id.* B14-B26. This is no more than a straightforward application of this Court's many precedents upholding equal access for, and government

neutrality toward, private religious expression. *E.g.*, *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).

To say that something -- such as student prayer at school -- is *not always constitutional* is not the same as saying that it is *always unconstitutional*. Yet petitioners embrace precisely this logical fallacy. Petitioners take *Santa Fe*'s condemnation of *school-sponsored* student prayer, and twist it into a prohibition on student prayer *regardless* of school sponsorship. This is simply wrong. "By no means do [the Religion Clauses of the First Amendment] impose a prohibition on all religious activity in our public schools." *Santa Fe*, 530 U.S. at 313. Furthermore, petitioners' approach ignores the great sensitivity to varying factual contexts that characterize this Court's Establishment Clause jurisprudence. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("no fixed, per se rule can be framed"); *id.* at 694 (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances").

Petitioners' approach profoundly misreads *Santa Fe*, which reaffirmed this Court's careful attention to the key factual details of Establishment Clause cases. Indeed, *Santa Fe* expressly recognized that, even in the context of religious messages which are "authorized by a government policy and take place on government property at government-sponsored school-related events, . . . *not every message delivered under such circumstances is the government's own.*" 530 U.S. at 320 (emphasis added). There is obviously a world of constitutional difference between, on the one hand, a school official

instructing Sally Jones to deliver "the invocation" at a school talent show, and on the other hand, Sally Jones choosing to sing "Amazing Grace" for her part in the talent show. The latter speech is genuinely student-initiated, not in the sense that she composed the words -- she did not -- but because the factual context clearly indicates that any religious content is solely attributable to the student, not the school.[7]

The Eleventh Circuit vacated the permanent injunction because that injunction unconstitutionally went well beyond the prohibition of school sponsorship of prayer. *See* Pet. App. F4-F5 (injunction purports to ban only "permitting school organized or officially sanctioned religious activity" but goes on to restrict even quiet student religious activity during non-instructional times), F6-F8 (restricting student religious speech at graduation regardless of school sponsorship), F8-F10 (restricting student religious speech at school assemblies and sporting events, and over any public address system during the instructional day, regardless of school sponsorship), F10-F12 (restricting religious literature distribution regardless of school sponsorship).

The Eleventh Circuit did *not* hold that schools must affirmatively allow religious speech by students or nonstudents, contrary to petitioners' assertion, Pet. at 8 n.3, 10. Rather, the Eleventh Circuit merely held that, if and when school officials permit genuinely student-initiated nonreligious speech, those officials must treat private religious speech evenhandedly. As the court of appeals explained:

---

[7]Petitioners therefore err badly by equating "genuineness" with "unscripted." Pet. at 12 n.7. The Eleventh Circuit said no such thing. This is a straw man of petitioners' own making.

> A student's right to speak religiously is not . . . without limit. The school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech.

Pet. App. B24.

The Eleventh Circuit did *not* limit the category of "state action" to speech "uttered by a school official," contrary to petitioners' assertion, Pet. at 11. Rather, the Eleventh Circuit held that the Establishment Clause proscribes a range of activities that fall within the scope of "state action," including

- state creation of an exclusively religious forum for private speakers, Pet. App. B9; and,

- active endorsement, encouragement, or participation by the state regarding student religious speech, Pet. App. B21-B23 & n.19.

This approach is completely consistent with *Santa Fe*.

In sum, petitioners misleadingly attempt to depict the decision below as extreme and outrageous, as if the ruling somehow allowed would-be religious speakers the right to burst into classrooms and lead prayer while the teacher cowered in the corner. Quite to the contrary, the decision below gives genuinely private religious speech no greater privilege than genuinely private nonreligious speech.

V. THERE IS NO CONFLICT IN THE CIRCUITS WARRANTING REVIEW.

Petitioners assert a "direct conflict" between the decision below and the decisions of other circuits. This is not accurate. The only decision that arguably conflicts with the decision below is the Ninth Circuit's decision in *Cole v. Oroville Union High School*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied sub nom. Niemeyer v. Oroville Union High School*, 121 S. Ct. 1228 (2001), and that is because *Cole* mistakenly reads *Santa Fe* as requiring a school, on the specific factual record at issue there, discriminatorily to censor out student religious speech at graduation ceremonies. *See* 228 F.3d at 1101-04. Any conflict between *Cole* and the decisions below is limited both to the issue of student religious speech at graduation and to the particular factual context of *Cole*. Moreover, this Court has already denied certiorari in *Cole*, regardless of any supposed conflict between *Cole* and *Chandler* on that issue. *See Niemeyer v. Oroville Union High School*, No. 00-1074 (U.S. cert. denied Mar. 5, 2001).

A. The Limited and Arguable Conflict with *Cole v. Oroville Union* Does Not Warrant Review.

No alleged conflict with the Ninth Circuit's decision in *Cole* warrants Supreme Court review.

Cole held that the Establishment Clause required a school to censor the religious content of one student's invocation, and another student's valedictory speech, at a high school graduation. *Cole* turned on the fact-bound conclusion that, under the specific circumstances of that case, the student

addresses in question "would not have been private speech," but rather would have been "attributable to the [School] District," 228 F.3d at 1102-03. The *Cole* court placed particular emphasis upon the school's supervision and approval of the content of student speakers' messages. *Id.* The Eleventh Circuit in the case at bar, by contrast, specifically disallowed school supervision of the religious content of student speech. Pet. App. B23. Furthermore, the present case involves a sweeping district court injunction that imposed categorical restrictions and disregarded factual particulars. The Eleventh Circuit concluded that the injunction was overbroad and needed to be drafted more narrowly. *Cole* is thus clearly distinguishable from the present case.

This Court has already denied certiorari in *Cole*, and as described above, the Eleventh Circuit's resolution of the questions before it in the present case was plainly correct. Denial of review here will allow the lower courts to sharpen -- or resolve -- any lingering apparent tension between the circuits' arguably varying interpretations of *Santa Fe*. In any event, the impending mootness of the present case makes it an especially poor vehicle for resolving any supposed constitutional conflicts on the merits.

B. The Decision Below Does Not Conflict with Any Other Circuits.

Petitioners assert a conflict between the Eleventh Circuit's decision in this case and various decisions of other circuits. These supposed conflicts are specious, as the Eleventh Circuit itself already explained. *See* Pet. App. B9, B21-B22 & n.18. None of these other cases contradict the principle set forth by

the Eleventh Circuit: that schools may not constitutionally impose *discriminatory* restrictions on *genuinely student-initiated* religious speech.

Thus, in *Collins v. Chandler Unified School District*, 644 F.2d 759, 760-61 (9th Cir. 1981), the government policy favored religion by specifically authorizing prayers. In the case at bar, by contrast, the injunctive ban on "permitting" student religious speech commits precisely the opposite constitutional error: uniquely *disfavoring* private religious expression.

In *ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (en banc), the school policy gave the student body the option of voting explicitly for prayer, *id.* at 1475. The Third Circuit faulted this policy for enabling a plurality of the student body to compel prayer at graduation. *Id.* at 1477. The present case concerns no such "vote-for-prayer" policy.

In *Berger v. Renssalaer Central School Corporation*, 982 F.2d 160 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993), school policy gave the principal and superintendent total discretion to grant or deny permission to outside speakers to distribute literature or publications to students, 982 F.2d at 1162-63. Such discretion is no guarantee of neutrality, and in fact can mask its opposite. The injunction in this case, by contrast, *required* school officials to discriminate against religious expression.

In *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965), the Second Circuit assumed that *permitting* prayers would *not* violate the Establishment Clause,

and simply held that the Free Speech and Free Exercise Clauses conferred no *special right* to interrupt the school day with prayer, 348 F.2d at 1001-02.

None of these cases advance Chandler's arguments.

VI. PETITIONERS ARE NOT ENTITLED TO VACATUR OF THE DECISION BELOW.

Petitioners mention, in passing, that if this case becomes moot, petitioners request this Court to vacate the decisions below. Pet. at 3 n.1, 22. This request should be denied.

As this Court recently -- and unanimously -- explained, "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortgage Corp. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). Petitioners in the present case have shown no such entitlement to vacatur.

First of all, for the reasons set forth elsewhere herein, the petition for certiorari should be either dismissed (for want of jurisdiction) or denied. Whereas a grant of certiorari is "a precondition for our vacatur," *U.S. Bancorp*, 513 U.S. at 28, petitioners would therefore not be entitled to vacatur. *See also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 724 (7th ed. 1993) ("since 1978, the Court has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of

review. In such cases the Court will merely deny certiorari") (footnote omitted).

Second, petitioners are themselves responsible for the fact that this case will become moot before this Court could afford plenary review. The Eleventh Circuit issued its panel decision on remand on October 19, 2000. At that point, petitioners still had ample time to petition for certiorari and have the case heard this Term (i.e., before Jesse Chandler graduated on May 23, 2001). Petitioners chose not to do so. Instead, petitioners requested en banc review, which the Eleventh Circuit did not deny until April 13, 2000, a date far too late to allow for Supreme Court review, in the normal course, for this Term.

Petitioners could have declined to seek en banc review. They did not. Petitioners could have withdrawn their request for en banc review when an order did not issue within a month or two. They did not. Petitioners could even have requested expedited review in this Court. *See, e.g., Bush v. Gore*, 531 U.S. 9 (2000). They did not. Instead, petitioners sat by while the opportunity for Supreme Court review slipped away. This "voluntary forfeiture of review constitutes a failure of equity," *U.S. Bancorp*, 513 U.S. at 26. Hence, petitioners have failed to meet the burden of demonstrating "equitable entitlement to the extraordinary remedy of vacatur." *Id.*[8]

---

[8]Were this Court nevertheless to conclude that vacatur is warranted, the proper course would be "vacatur down the line," *Arizonans for Official English*, 520 U.S. at 75, i.e., including the district court's rulings regarding the permanent injunction.

CONCLUSION

The petition for a writ of certiorari should be dismissed or denied.

Respectfully submitted,

William H. Pryor Jr.
Attorney General of
Alabama
Charles B. Campbell
Assistant Attorney
General
Office of the Attorney
General of Alabama
11 South Union St.
Montgomery, AL 36130
(334) 242-7372

Jay Alan Sekulow
Deputy Attorney General
(*Counsel of Record*)
Stuart J. Roth
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Walter M. Weber
1650 Diagonal Rd., 5th Floor
Alexandria, VA 22314
(703) 740-1450

Attorneys for Respondents

May 17, 2001